

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD BAIRD

Defendant.

Case No. CR02-256P

This matter comes before the court on Remand from the Ninth Circuit¹ and on the Court's Procedural Orders (CR03-256MJP, Dkt. No. 46). The court must now determine whether the sentence imposed would have been materially different had the District Court known that the Sentencing Guidelines were advisory, and not mandatory. The burden of proof is set out in the procedural order.

The Court has considered, in addition to the Ninth Circuit's unpublished opinion, the following:

- (1) the presentence report;
- (2) sentencing memoranda;
- (3) the judgment;
- (4) the sentencing transcript;

¹United States v. Clifford Baird, 9th Cir. No. 04-30324

1 (5) the file and events of the entire proceeding;

2 (6) all memoranda filed in support of and in opposition to, resentencing.

3 United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (“Ameline II”), directs that the District
4 Court determine whether a “materially different” sentence would have been imposed, had the District
5 Court known that the sentencing guidelines were advisory only. Ameline did not define “materially
6 different sentence.” The point from which a sentence is viewed becomes significant in applying that
7 term to an existing sentence. For example, while a prosecutor may argue that one month off a 360-
8 month sentence is not material, a defendant completing his 359th month of a 360-month sentence
9 would likely find the same one month highly material.

10 The Ameline dissent, at pp. 1096-97, in discussing a “materially different sentence,” speaks in
11 terms of “denial of substantial rights,” or “that the probability of a different result is sufficient to
12 undermine confidence in the outcome of the proceedings.”

13 Black’s Law Dictionary defines “material” as “having some logical connection with the
14 consequential facts” and “of such nature that knowledge of the item would affect a person’s decision
15 making; significant, essential.” Regardless of which definition of “material” one accepts, the result in
16 this case would be the same.

17 ANALYSIS

18 Defendant Baird was convicted, by plea, of conspiracy to commit securities fraud, wire fraud,
19 mail fraud, and money laundering pursuant to Title 18 United States Code §371. Mr. Baird also
20 admitted to causing financial losses to victims in the amount of \$10,800,000. Mr. Baird was
21 sentenced to 27 months in prison for his admitted participation in a securities fraud conspiracy.

22 The Court, at sentencing, acknowledged that the mandatory nature of the guidelines was in
23 flux due to the U.S. Supreme Court’s ruling in U.S. v. Blakely, 542 U.S. 296 (2004) and the Ninth
24 Circuit’s ruling in Ameline I, 376 F. 3d 967 (9th Cir. 2004). At the sentencing hearing, there was
25 much discussion on the record between the Government, Defense counsel, and the Court regarding
26 the likely status of the Guidelines in the future. The Court noted that the top of the Guideline range

1 in Mr. Baird's case was 57 months, but because it was unclear at the time of sentencing if the
2 guidelines applied, the Court noted that its task was to determine an appropriate sentence between
3 zero and 57 months. (Dkt. No. 42 at 19, ln. 9). The Court considered both parties'
4 recommendations. Defense counsel recommended a 16 month split sentence, while the Government
5 recommended a 27 month sentence. The Court ultimately adopted a 27 month sentence because it
6 felt that it was an appropriate amount of time, given the size of the scheme, the number of people
7 involved, and the admitted loss amount. (Id. at 32). The Defendant now asks for re-sentencing under
8 Ameline II. The main argument supporting this request is that the Court did not consider mitigating
9 personal circumstances under 18 U.S.C. § 3553(a), because it erroneously viewed the Guidelines as
10 mandatory. Mr. Baird also argues that the Court did not consider the 16 month split sentence as an
11 option because it felt constrained by the Guidelines. In a system where the Guidelines are advisory,
12 Defendant argues that the Court should have considered Mr. Baird's age, immigration status, family
13 circumstances, and felt unconstrained to grant a non-traditional sentence, such as the 16 month split
14 proposed by Defense counsel.

15 The Court has reviewed the full record of this case, including the Ninth Circuit's Order on
16 remand, however, and determines that at the time of sentencing, the Court acknowledged that the
17 status of the Guidelines was in flux. The Court stated on the record that it felt its task was to render
18 an appropriate sentence between zero and 57 months (the top end of the sentencing range under the
19 Guidelines). Recognition of the uncertain state of the Guidelines at the time of sentencing gave the
20 Court wide latitude to impose a just sentence uniquely tailored to Mr. Baird's admitted level of
21 culpability. The Court considered and rejected a 16 month split sentence as too lenient, in proportion
22 to the sentences of other individuals involved in the scheme. Id. Additionally, the Court
23 acknowledged Mr. Baird's family circumstances and took those into consideration at the time of
24 sentencing. Id. For these reasons, the Court does not now find that its sentence of Mr. Baird would
25 have been materially different had it known that the Guidelines were advisory. Therefore, it is now
26 **ORDERED** that:

1 This Court's Order finding that there would be no material difference in Mr. Baird's sentence
2 shall be officially placed on the record, pursuant to the Ninth Circuit's directive in Ameline, 409 F. 3d
3 at 1085.

4 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of
5 record and to any party appearing *pro se* at said party's last known address.

6 DATED this 27th day of January, 2006.

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10 Marsha J. Pechman
11 United States District Judge
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